Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

In the Matter of Petition for Declaratory Ruling in Response to Primary Jurisdiction Referral, *Autauga County Emergency Management Communication District et al. v. BellSouth Telecommunications, LLC*, No. 2:15-cv-00765-SGC (N.D. Ala.)	WC Docket No. 19-44

COMMENTS OF THE COUNTIES OF CHARLESTON, RICHLAND, DORCHESTER, AND THE TOWN OF SUMMERVILLE, SOUTH CAROLINA

The Counties of Charleston, Dorchester, and Richland County, South Carolina and the Town of Summerville, South Carolina (the "South Carolina commenters") submit this comment in support of the Alabama 911 Districts' Petition for Declaratory Ruling and in opposition to BellSouth Telecommunications, LLC's Petition for Declaratory Ruling. The South Carolina commenters support the Alabama 911 Districts' plain language interpretation of 47 U.S.C. § 615a-1 ("NET 911 Act").

I. BACKGROUND

The South Carolina commenters are all engaged in litigation against telephone service providers for their under-billing of 911 service charges. The 911 service charges at issue in the South Carolina litigation fund 911 services, and the South Carolina commenters are statutorily limited in how they can spend those 911 funds and are prohibited from diverting the 911 service charges to non-911 related purposes. *See* S.C. Code Ann. § 23-47-40. Although the South Carolina commenters also receive 911 funding from other sources, funding from 911 service charges is critically important to the provision of necessary, life-saving services. In their

complaints, the South Carolina commenters have alleged the telecommunication company Defendants have knowingly, consistently and systematically under-remitted 911 service charges in a number of ways thereby depriving the commenters' 911 systems of funds to which they are entitled by law.

II. THE COMMISSION SHOULD GRANT THE ALABAMA 911 DISTRICTS' PETITION.

A. The NET 911 Act Does Not Preempt State 911 Statutes.

Just as they have before this Commission, in the South Carolina litigation, the telephone service providers—led by AT&T Corp. and Bellsouth LLC—have raised a tortured preemption argument, claiming that South Carolina's 911 Act conflicts with 47 U.S.C. § 615a-1(f)(1). The providers' requested preemption declaration is incorrect as a matter of law, incredibly broad, and would jeopardize the enforceability of the South Carolina 911 funding statute and the statutes of other states in their entirety.

BellSouth requests a declaration "that § 615a-1(f)(1) preempts any state statute that requires interconnected VoIP customers to pay a higher total amount in 911 charges than customers *purchasing the same quantity of non-VoIP telephone service*."[1] Similarly, CenturyLink frames the issue as a declaration "that any state law that would impose discriminatorily high 911 fees or charges on interconnected VoIP—or on VoIP services other than interconnected VoIP—would frustrate federal policy and thus is preempted."[2] Determining whether a 911 funding statute imposes "discriminatorily high 911 fees or charges on interconnected VoIP" is an open-ended inquiry that could call into question the validity of numerous state 911 funding statutes. Instead of

[1] BellSouth Petition at 24 (emphasis added).
[2] CenturyLink Comment at 13.

clarifying Section 615a-1, such a declaration would create ambiguity, uncertainty, and jeopardize the entirety of South Carolina's 911 funding system.

As with any preemption question, the Commission must begin by heeding the strong presumption against preemption. This presumption and the well-established cannons of statutory construction mandate that the Commission strictly adhere to the plain text of the relevant statutes, and avoid an interpretation that leads to preemption where at all possible (i.e., the doctrine of constitutional avoidance).[3] Here, the plain language of the NET 911 Act supports the Alabama 911 Districts' position. Only by stretching the language of the Net 911 Act, does BellSouth reach a different conclusion. Thus, the NET 911 Act does not (and was never intended to) affect the total amount of 911 charges imposed on any particular subscriber. To the contrary, its plain language establishes only that the base rate or amount of a single 911 service charge for VoIP service should not exceed that of non-VoIP service.

This plain language interpretation is evident, easy to understand and easy to apply. The plain words of the NET 911 Act are simply not what BellSouth and the other telecoms claim they are. Section 615a-1, in its entirety, provides the following:

> Nothing in this Act, the Communications Act of 1934 (47 U.S.C. 151 et seq.), the New and Emerging Technologies 911 Improvement Act of 2008, or any Commission regulation or order shall prevent the imposition and collection of a fee or charge applicable to commercial mobile services or IP-enabled voice services specifically designated by a State, political subdivision thereof, Indian tribe, or village or regional corporation serving a region established pursuant to the Alaska Native Claims Settlement Act, as amended (85 Stat. 688) [43 U.S.C.A. § 15601 et seq.][1] for the support or implementation of 9-1-1 or enhanced 9-1-1 services, provided that the fee or charge is obligated or expended only in support of 9-1-1 and enhanced 9-1-1 services, or enhancements of such services, as specified in the provision of State or local law adopting the fee or charge. For each class of subscribers to IP-enabled voice services, ***the fee or charge*** may not exceed the

[3] *See Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

> ***amount of any such fee or charge*** applicable to the same class of subscribers to ***telecommunications services***.[4]

The last section establishes that the amount—i.e., the unit price—of the 911 service charge for VoIP may not be higher than the amount of the 911 service charge for exchange access service.

BellSouth, on the other hand, suggests that the total amount of 911 service charges for a VoIP subscriber cannot exceed those of a non-VoIP subscriber. This is wrong for many reasons. First, that is not what the words of the statute say. BellSouth focuses on the wrong word: "amount." In § 615a-1(f)(1), "amount" modifies "fee or charge," and both words are singular. Defendants' interpretation expands the definition of "amount" and would only makes sense if "fee or charge" were plural. Because they are not plural, and thus, Defendants' interpretation fails. *See Armijo v. FedEx Ground Package Sys. Inc.*, 285 F. Supp. 3d 1209, 1224 (D.N.M. 2018) ("The Court must assume the [L]egislature chose this plural form advisedly, and to assume otherwise injects unnecessary ambiguity into the statute." (internal citations and quotations omitted)).

Second, BellSouth's interpretation leads to an absurd result. It is beyond dispute that the total amount of 911 charges varies greatly from customer-to-customer. It would be impossible for the South Carolina commenters to ensure that VoIP customers across the Board have the same total amount of 911 charges as other customers with traditional service. Because of the striking differences between VoIP and circuit switched technology, determining whether a VoIP customer is "purchasing the same quantity" of telephone service as a non-VoIP customer is difficult, if not impossible. As the Commission well knows, VoIP is highly flexible and customizable compared to traditional wireline telephony. These flexible options mean that VoIP and traditional service are

[4] 47 U.S.C. § 615a-1 (emphasis added).

often not comparable on a unit-to-unit basis, and thus, imposing an overbroad equivalence standard is simply unworkable. The same rationale, of course, would apply to cellular service.

Third, beyond the text of the statute, neither BellSouth nor any of the other telecoms provide any evidence or compelling argument that the Alabama 911 Districts' interpretation of the NET 911 Act stands as an actual obstacle to any federal purpose or objective.[5] Conflict preemption may not be hypothetical. "Pre-emption is ordinarily not to be implied absent an actual conflict . . ." *English v. Gen. Elect. Co.*, 497 U.S. 72, 90 (1990) (quotations omitted). It arises only from "an actual conflict, not merely a hypothetical or potential conflict." *Chicanos Por Law Causa, Inc. v. Napolitano*, 558 F.3d 856, 863 (9th Cir. 2009). Yet Defendants present only hypotheticals. *See Virginia Uranium, Inc. v. Warren*, 848 F.3d 590, 599 (4th Cir. 2017) (rejecting hypothetical basis for obstacle preemption); *English*, 497 U.S. at 90 (holding that potential conflict was "too speculative a basis on which to rest a finding of pre-emption").

South Carolina's law imposing 911 fees on VoIP has been in effect since 2011 and South Carolina and other states have operated under the current state of the law without the preemptive ruling requested by BellSouth—since the NET 911 Act became effective. And despite BellSouth's claims, telephone providers have made great progress in implementing IP technology in South Carolina and across the country. That is why neither BellSouth nor any other telephone provider has given this Commission any concrete example of a state law—including South Carolina's 911 law—impeding the progress made with regards to VoIP and other IP-based telephone technology. They have not because that is not true.

[5] Here, BellSouth's requested ruling on preemption affects two important state powers—the power to impose fees and taxes and the power to protect the public safety.

In fact, this Commission's data from 2017 establish the opposite. In June of 2017, the data indicated that there were 55 million end-users on traditional switched access compared to 64 million interconnected VoIP subscriptions.[6] During this time period, VoIP subscriptions increased at approximately 8% per year, whereas retail switched access subscriptions declined at 11% per year.[7] Among residential customers, approximately 64% of connections were VoIP. Among businesses, 43% were VoIP.[8] These figures eliminate BellSouth's preemption argument. VoIP is not and has not been prejudiced by 911 service charges. It is quickly on its way to eclipsing and eliminating traditional wireline service. Thus, BellSouth's obstacle preemption claim cannot succeed because it is based on an obstacle or conflict that is even less than hypothetical – it is nonexistent.

Because the plain language of the NET 911 Act is clear and because South Carolina's (and other states' laws) do not conflict with any federal policy, the Commission should grant the Alabama 911 Districts' petition. Maintaining the status quo, avoiding an drastic change in 911 policy, and allowing the states to freely exercise their fundamental police powers will ultimately further the goal of having adequately funded state 911 systems that are not overly constrained by the federal government.

B. The Alabama 911 Districts' Requested Declaratory Ruling Will Not Exacerbate 911 Service Charge Diversion.

Finally, the argument from various commenters that states will divert more 911 funds without the requested declaration is absurd. South Carolina specifically lists prohibits expenditures

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[6] Voice Telephone Services: Status as of June 30, 2017, Industry Analysis and Technology Division Wireline Competition Bureau (November 2018), publicly available at http://www.fcc.gov/general/iatd-data-statistical-reports.
[7] *Id.*
[8] *Id.*

from 911 service charge funds for non-911 purposes. If the law stays the same—which the Alabama 911 Districts are requesting—then South Carolina would continue to enforce its current law. If the Commission grants BellSouth's declaration, then funding from service charges could potentially decrease. Thus, if either petition threatens 911 funding, it is BellSouth's petition.

C. Bandwidth's Comment Defies the Commission's E911 IP Enabled Order.

Bandwidth filed a comment making two erroneous arguments about the Commission's *E911 IP Enabled Order*[9]: (1) that it prohibits the assessment of 911 fees on non-interconnected VoIP technologies that provide users the ability to call 9-1-1 and (2) that it "imposed the requirement to support 911 only on providers of… a two-way PSTN-capable consumer IP service."[10] Both arguments are off-base.

First, the *E911 IP Enabled Order* only addresses whether certain IP service providers are required to offer access to 911 to their customer. Ultimately, the Commission ruled that only interconnected-VoIP service providers are obligated to provide access to 911 to their users. However, the Commission did not address the issue of whether states or local governments could charge 911 fees to non-interconnected VoIP providers that do, in fact, offer 911 access to their customers.

As to Bandwidth's second argument, the Commission specifically ruled as follows:

> We tentatively conclude that a provider of a VoIP service offering that permits users generally to receive calls that originate on the PSTN and separately makes available a different offering that permits users generally to terminate calls to the PSTN should be subject to the rules we adopt in today's Order if a user can combine those separate offerings or can use them simultaneously or in immediate succession.[11]

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[9] First Report and Order and Notice of Proposed Rulemaking, *In the Matter of E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, ¶ 24 n.77 (2005) ("*E 911 IP Enabled Order*").

[10] Bandwidth Comment at 5-6.

[11] *E 911 IP Enabled Order* at ⁋ 58.

It seems apparent that a provider like Bandwidth cannot offer separate origination and termination service, which can be combined, and avoid the 911 access requirements imposed by the Commission. Yet that is exactly what Bandwidth argues.

III. CONCLUSION

For the reasons stated above, the South Carolina commenters request that the Commission grant the Alabama 911 Districts' petition and deny BellSouth's petition.

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Respectfully submitted,

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